TEBIR DESA DEVELOPMENT SDN. BHD.

v.

AZRAT & HASHIM SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
TUAN LOW HOP BING JC
[ORIGINATING SUMMONS NO: R3-24-46-94]
11 FEBRUARY 1995

CONTRACT: *Power of Attorney - Power of High Court to order rectification of power of attorney - Sections 30, 32 Specific Relief Act 1950 - Mutual mistake - Whether High Court has power to order rectification of a contract or other instrument in writing - Real intention of parties.*

By an Agreement dated 26 August 1988 entered into between the defendant and the plaintiff, the defendant had expressly agreed to allow the plaintiff and the plaintiff had agreed to undertake the development of the land held under H.S. (D) 55288, No. P.T. 7628, Mukim Batu, Wilayah Persekutuan and construction of residential, commercial and other buildings together with the amenities and conveniences thereto.

Concurrent to the Agreement entered into and pursuant to cl. 13(b) of the said Agreement, the solicitors who prepared the said Agreement, Messrs Suhaimi Khoir Zulkifli & Chang submitted to the plaintiff a Power of Attorney purportedly in favour of the plaintiff. The Power of Attorney was, in substance, to allow the plaintiff to undertake the development of the said Land as per the said agreement.

Owing to a typographical error in the name of the plaintiff, the description of the plaitniff intended to be comprised in the said Power of Attorney was inaccurate as it was expressed to be created in favour of Tebir Desa Sdn. Bhd. instead of Tebir Desa Development Sdn. Bhd.

Held:

[1] The Court may order the equitable remedy of rectification in order to modify the terms of a written contract, such as the Power of Attorney in the instant case, for the purpose of giving effect to the real intention of the parties thereto i.e. the donor and the donee in the instant case.

[2] In order to obtain the remedy of rectification the onus is on the plaintiff to establish that the contract or, more specifically in the instant case, the Power of Attorney, was executed as a result of a mistake which was mutual or common to all the parties thereto.

[3] In order to justify correcting a mistake in an instrument, the evidence must be clear and unambiguous that a mistake has been made, that the instrument does not represent the parties common intention, what the common intention was and that the alleged intention to which it is desired to make the agreement conformable continued concurrently in the parties' minds down to the time of the execution of the instrument. The party seeking to rectify must also be able to show precisely the form to which the deed ought to be altered.

[4] As the mistake in this case was indeed a typographical mistake or omission and on the foregoing grounds, an order in terms of the application should be made.

[Order in terms of application].

Cases referred to:
Oh Hiam & Ors. v. Tham Kong [1967] 1 MLJ 65 ***(refd)***
Lim Hong Shin v. Leong Fong Yew, [1918] 2 FMSLR 187, 188 ***(refd)***

Legislation referred to:
Specific Relief Act 1950 (Act 137) ss. 30, 32.

Other sources referred to:
Halsbury's Laws of England, 4th Edn. Vol. 32 1980 p. 29, para. 50, 51, 56.

For the plaintiff - M/s. Kumar Jaspal Quah & Aishah
For the defendant - M/s. Suhaimi Khor Zulkifli & Chang

JUDGMENT

Low Hop Bing JC:

Nature Of Application

This application *vide* Encl. 6 is made by the plaintiff who claims the following reliefs:

1. An order that the Power of Attorney created on 26 August 1988 by Azrat & Hashim Sdn. Bhd. in favour of Tebir Desa Sdn. Bhd. over all that piece of land held under H.S. (D) 55288, No. P.T. 7628, Mukim of Batu, Wilayah Persekutuan and duly registered in the High Court at Kuala Lumpur on 5 September 1988 as P.A. No. 20079/88 be rectified by adding the word "Development" immediately after the words "Tebir Desa" as appearing on the fifth line of the first paragraph at p. 1;
2. An order that the said Power of Attorney as rectified hereinabove take effect from the date of its creation i.e., 26 August 1988.
3. The above rectification order be endorsed upon the copy of the said Power of Attorney and be deposited with the Registry of the High Court and the office of the Registrar of Titles, Wilayah Persekutuan, Kuala Lumpur.
4. An order directing the Registrar of the High Court and the Registrar of Titles, Wilayah Persekutuan to enter a memorial of the said rectification in their register or records.
5. The cost of this application and incidental thereto be borne by the defendant.
6. Such further or other reliefs as this Honourable Court deem fit and proper.

This application is supported by the affidavit of Siah Teong Boon, the managing director of the plaintiff.

Facts Of The Case

By an Agreement dated 26 August 1988, entered into between the defendant and the plaintiff (hereinafter referred to as "the said Agreement"), the defendant had expressly agreed to allow the plaintiff and the plaintiff had agreed to undertake the development of the land held under H.S. (D) 55288, No. P.T. 7628, Mukim Batu, Wilayah Persekutuan (hereinafter referred to as "the said Land") and construction of residential, commercial and other buildings together with the amenities and conveniences thereto.

Concurrent to the Agreement entered into and pursuant to cl. 13(b) of the said Agreement, the solicitors preparing the said Agreement, M/s. Suhaimi Khor Zulkifli & Chang prepared and submitted to the plaintiff a Power of Attorney purportedly in favour of the plaintiff.

The Power of Attorney was, in substance, to allow the plaintiff to undertake the development of the said Land and construction of residential, commercial and other buildings together with the amenities and conveniences thereto.

Owing to a typographical error in the name of the plaintiff, the description of the plaintiff intended to be comprised in the said Power of Attorney was inaccurate. Contrary to the true intention of the parties, the name of the plaintiff was inaccurately given and the Power of Attorney was expressed to be created in favour of Tebir Desa Sdn. Bhd.

The Power of Attorney was executed on 26 August 1988 without the error therein contained being perceived and in the belief of the parties thereto that the Power of Attorney was in fact executed in favour of the plaintiff and not Tebir Desa Sdn. Bhd.

So soon as the plaintiff discovered that the Power of Attorney did not embody the true intention of the parties set out above, the plaintiff by their solicitors requested the defendant to agree to rectify the said Power of Attorney embodying the true intention of the parties and tendered the same to the defendant for execution by them but, notwithstanding that the plaintiff was at all material times ready and willing to fulfil their obligations under the said Agreement, the defendant had wrongfully refused to sign and execute the same.

Further by an affidavit affirmed by one Azrat Gull Bin Amirzat Gull for the defendant, dated 28 March 1994, in the Kuala Lumpur High Court Civil Suit No. S1-22-156-1994 (hereinafter referred to as the "said affidavit") pending before the High Court, in relation to disputes relating to the said Agreement, the defendants admitted that the Power of Attorney was in fact created in favour of the plaintiff pursuant to the said agreement.

Contention Of The Parties

In opposing the plaintiff's application herein, the defendant submits that the plaintiff has not used the Power of Attorney to execute the Sale and Purchase Agreement with the buyers. In addition the defendant contends that there were disputes between the plaintiff and the defendant and that the plaintiff was guilty of laches in bringing this application.

The plaintiff submits that the mistake is a mutual mistake and hence rectification of the Power of Attorney should be allowed in order to reflect the true and real intention of the parties, so that the name of the donee in the Power of Attorney should read "Tebir Desa Development Sdn. Bhd" instead of "Tebir Desa Sdn. Bhd." It was further submitted that the word "Development" was inadvertently omitted consequent upon a mistake.

Judgment Of The Court

In my considered opinion, the powers of the High Court in ordering rectification of a contract or other instrument has never been doubted. Chapter III of the Specific Relief Act 1950 (Act 137) provides for *inter alia*, the rectification of instruments. More particularly under s. 30, the Court may rectify a contract or other instrument in writing which does not reflect the real intention of the parties. The relevant portion of s. 30 reads:

> 30. When, through a mutual mistake of the parties, a contract or other instrument in writing does not truly express their intention, either party..., may institute a suit to have the instrument rectified: and if the Court finds it clearly proved that there has been... mistake in framing the instrument, and ascertain the real intention of the parties in executing the same, the Court may in its discretion rectify the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

Section 32 of the same Act establishes the principle of rectification in the following words:

> 32. In rectifying a written instrument, the Court may enquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the enquiry what the language of the instrument was intended to be.

The Court may order the equitable remedy of rectification in order to modify the terms of a written contract, such as the Power of Attorney in the instant case, for the purpose of giving effect to the real intention of the parties thereto i.e., the donor and the donee in the instant case. In order to obtain the remedy of rectification, the onus is on the plaintiff to establish that the contract or, more specifically in the instant case, the Power of Attorney, was executed as a result of a mistake which is mutual or common to all the parties thereto (see *Halsbury's Laws of England*, 4th Edn. Vol. 32 1980 at p. 29 para. 50).

Hence, the Court will rectify an instrument so as to make it express the parties' true intention. The principle on which it acts is that the parties are to be placed as far as possible in the same position as that in which they would have stood if the error to be corrected had not been made. In a proper case the Court will rectify eg. a deed of settlement, an appointment, a deed of revocation, a lease, a bond, a bill of exchange, bought and sold notes, a schedule of quantities annexed to a contract to execute works for a gross sum, purporting to show how the gross sum is made up, an insurance policy, even after a loss has become known. Rectification is also available where words were purposely used or omitted but in the mistaken belief that they bore a different meaning from their correct meaning as a matter of construction. (See, *Ibid*, para. 51 and the authorities cited therein).

To justify the Court in correcting a mistake in an instrument, the evidence must be clear and unambiguous that a mistake has been made, that the instrument does not represent the parties' common intention, what the common intention was and that the alleged intention to which it is desired to make the agreement conformable continued concurrently in the parties' minds down to the time of the execution of the instrument. The party seeking to rectify must also be able to show precisely the form to which the deed ought to be altered. (See *Ibid*, para. 56 and the authorities cited therein).

In *Oh Hiam & Ors. v. Tham Kong* [1967] 1 MLJ. 65, the parties had entered into a contract for the sale of certain lands at Gombak but by a mistake common to both parties, the written agreement and the transfer dealt not only with the lands agreed to be sold but also a piece of land at Setapak. The plaintiffs applied to set aside the transfer of the land at Setapak. The Court held that the agreement could be rectified in equity. Gill J quoting authorities said:

> It is clear from the authorities that, although the agreement in the present case is not a nullity the Courts in England would order rectification of such an agreement, provided the following conditions are satisfied: (a) there must be an actually concluded contract antecedent to the instrument to be rectified, as the Court will not make a new agreement for the parties; (b) there must be clear evidence of the real intention; (c) there must be a mistake common to both parties and it must have existed at the time of the execution of the instrument; (d) the mistake must be exactly proved, i.e., the plaintiff must show the precise form in which the instrument ought to be drawn up; and (e) the mistake must be one of expression only.

In *Lim Hong Shin v. Leong Fong Yew*, [1918] 2 FMSLR 187, 188, Edmonds JC said:

> The general principle applicable in cases of rectification on account of mistake is set out in s. 31 of the Specific Relief Enactment (since replaced by s. 30 of the Specific Relief (Malay States) Ordinance, 1950). The mistake must be common to all parties, and there must be very

clear evidence of the real intention. When these conditions exist the Court may rectify the instrument so as to express the real intention so far as this can be done without prejudice to rights acquired by third parties in good faith and for value.

In the case before me, I find as a fact that the conditions as adumbrated by Gill J in the *Oh Hiam* case above have been established and fulfilled by the plaintiff. The mistake is indeed a typographical mistake or omission. In the circumstances and on the foregoing grounds, I make an order in terms of this application.